LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-798

AMERICAN INSTITUTE OF MERCHANT SHIPPING,
LINER COUNCIL
Petitioner

vs.

AMERICAN MARITIME ASSOCIATION,
PETER G. PETERSON, *et al.*
Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WARNER W. GARDNER
ROBERT T. BASSECHES
734 - 15th Street, N.W.
Washington, D. C. 20005

ODELL KOMINERS
1776 F Street, N.W.
Washington, D. C. 20006
Attorneys for Petitioner

KOMINERS, FORT, SCHLEFER & BOYER
SHEA & GARDNER
Of Counsel

December 4, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
1. *The 1936 Act*	2
2. *The Preference Cargoes*	2
3. *The Agency Proceedings*	3
4. *The Court Proceedings*	5
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

TABLE OF CITATIONS

CASES	Page
American President Lines, Ltd., 6 S.R.R. 1031, 1041 (1966)	7
States Marine Internat'l, American Maritime Association v. *Peterson*, 518 F.2d 1070	1
REGULATION	
46 C.F.R. §§ 280.1-10	5
STATUTES	
Agricultural Trade Development & Assistance Act of 1954, 68 Stat. 454	3
Amendments to E.C.A., 63 Stat. 50	3
Cargo Preference Act, April 28, 1904, 10 U.S.C. § 2631	2
Economic Cooperation Act, 62 Stat. 143	3
Famine Relief Act of 1953	3
India Emergency Food Aid Act of 1951, 65 Stat. 69	3
Merchant Marine Act, 1936, 49 Stat. 46 U.S.C. §§ 1101 *et seq.*	*passim*
Mutual Defense Assistance Act of 1949, 63 Stat. 714	3
Mutual Security Act of 1954, 68 Stat. 832	3
Public Resolution 17, March 26, 1934, 15 U.S.C. § 616a	2
Wheat for Pakistan Act of 1953, 67 Stat. 80	3
Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122	3
5 U.S.C. §§ 701-706	5
28 U.S.C. § 1254(1)	2
28 U.S.C. §§ 1331, 1333, 1337	5
MISCELLANEOUS	
H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2	6
Op. B-159245, Comp. Gen., S.R.R. 10,264 (1966)	7

IN THE

Supreme Court of the United States

No. 75———

AMERICAN INSTITUTE OF MERCHANT SHIPPING,
LINER COUNCIL
Petitioner

vs.

AMERICAN MARITIME ASSOCIATION,
PETER G. PETERSON, *et al.*
Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The June 12, 1972, decision of the Maritime Subsidy Board [A-34-71] is unofficially reported at Pike & Fisher, 13 SRR 44. The February 7, 1974, opinion of the District Court [A-29-38] is unreported. The September 5, 1975, opinion of the Court of Appeals for the District of Columbia Circuit [A-1-28] is reported at 518 F.2d 1070. Each is reproduced in the Appendices to the primary petition in this case, that of American Maritime Association. Our references are to that Appendix [A-1-80].

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision and judgment of the court below were entered on September 5, 1975.

QUESTION PRESENTED

Whether the Maritime Administration is authorized to issue regulations which require the abatement of operating-differential subsidy, on a sliding scale, to the extent that more than 50 per cent of the annual freight revenue on either leg of a voyage is derived from certain categories of "preference cargo," reserved in whole or in part for carriage by U.S.-flag vessels.

STATUTES INVOLVED

There are directly involved (a) Sections 101, 601, 603 and 901(b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. §§ 1101, 1171, 1173 and 1241, and (b) roughly a dozen statutes providing for Government grant or financing of goods destined for foreign relief or consumption.

STATEMENT

1. *The 1936 Act.* The Merchant Marine Act, 1936, 49 Stat. 1965, 46 U.S.C. §§ 1101 et seq., authorizes the award of subsidy in two areas: Title V authorizes payment of construction-differential subsidy to shipyards, and Title VI authorizes payment of operating-differential subsidy to ship operators, in each case in an amount designed to off-set the lower costs of foreign competitors.

2. *The Preference Cargoes.* The Act of April 28, 1904, 10 U.S.C. § 2631, requires that all military cargo be shipped on U.S.-flag vessels; Public Resolution 17 of March 26, 1934, 15 U.S.C. § 616a, requires that except

as waived by the Maritime Administration all cargo resulting from U.S. Government loans be shipped on U.S.-flag vessels. At least nine post-war relief statutes required that at least 50% of the cargo shipments be on U.S.-flag vessels.[1] The cargo preferences established individually by those statutes were consolidated and codified in 1954 as § 901(b) of the Merchant Marine Act.

The preference cargoes fall into three principal categories when classified according to their shipping characteristics:[2] (a) Military cargo, reserved entirely for U.S.-flag vessels, has since 1966 been allocated among the lines on the basis of semi-annual competitive bids [A-46-48]. (b) Civilian preference cargo, usually in packaged form and flowing out of the ordinary commercial world, moves under conference rates uniform for preference and commercial cargoes, and for U.S.- and foreign-flag carriers [A-48-51]. (c) Civilian preference cargo moving usually in bulk at "open rates" is individually bid by the carrier without conference control. Most of the carriage is by tramp vessels in full load lots but some moves in smaller parcels aboard liners. As only U.S.-flag vessels can bid for the 50% which is preference, the rates are typically more than the foreign-flag bids on the other 50% [A-51-52].

3. *The Agency Proceedings.* American Maritime Association ("AMA") on July 1, 1969, petitioned the Secretary of Commerce to issue rules which would require the

---

[1] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[2] We pass over a fourth and less prevalent category recognized by the agency: open-rated preference cargo which moves at world rates [A-52-53].

repayment of operating subsidy in exact proportion to the carriers' revenues from all types of preference cargo. The American Institute of Merchant Shipping, Liner Council ("AIMS") answered. The matter was in the end delegated to the Maritime Subsidy Board which directed an evidentiary fact-finding hearing [A-6-7].

Before the agency, and subsequently before the courts, AMA and AIMS have taken diametrically opposed positions. AMA urged that, as the Merchant Marine Act conditions subsidy upon a determination that the subsidized vessels will meet foreign competition, so no subsidy can be paid in respect of any cargo which is not subject to foreign-flag competition. AIMS urged that if the vessels and the services were competitive, there was no requirement that particular lots of cargo be subject to foreign-flag competition.

The Chief Examiner concluded AMA was right as to military and open-rated civilian preference cargo, but not as to conference-rated civilian preference cargo [A-7]. The Maritime Subsidy Board on exceptions held [A-42]:

> * * * the Board finds that it can accept neither the AIMS nor the AMA interpretation of § 601. The Board specifically rejects AMA's contention that subsidized vessel operations must be devoted almost exclusively to carriage of cargo subject to foreign-flag competition in order to qualify for an ODS contract. The Board also rejects AMA's contention that ODS may be paid under a valid contract only for carriage of cargo subject to foreign-flag competition. We think the statute and its legislative history clearly establish that the purpose of the ODS program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored.

> Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

This principle led the Board to conclude that subsidy should be reduced, on a sliding scale, to the extent that more than 50% of the annual freight revenue, on either the outward or the inward legs of the voyage, derived from military or open-rated civilian preference cargo. [A-43-36, 48, 52] Regulations to accomplish this were proposed [A-75-80] and subsequently adopted [46 C.F.R. § 380.1-10].

4. *The Court Proceedings.* AMA filed a complaint in the District Court to set aside the Board decision.[3] AIMS, because the practical injury to its members was not large, did not file suit, but instead intervened as a defendant along with the Government officials. It advanced, however, its full argument as a reason for dismissing the AMA complaint. District Judge Aubrey Robinson accepted the AIMS reasoning and dismissed the complaint [A-29-33].

Both AMA and the Government defendants appealed. The Court of Appeals accepted the Government reasoning and remanded to the Distrit Court for modification of its order of dismissal [A-1-28].

REASONS FOR GRANTING THE WRIT

1. We shall urge that the AMA petition, *American Maritime Association* v. *Peterson*, No. 75——, should be denied. If that petition be denied, so too should this cross-petition be denied.

2. If, contrary to our contentions, the AMA petition should be granted, then so also should this cross-petition

---

[3] Jurisdiction, asserted under 28 U.S.C. §§ 1331, 1333, 1337 and 5 U.S.C. §§ 701-706, was not challenged.

be granted, in order that the Court may have the whole case before it. Indeed, as we read the opinion of the Court below, it devoted 17 pages to a discussion of the merits [A-11-28] of which 13 were directed primarily to a rejection of the AIMS argument [A-12-25].

3. The AIMS argument is in any view a substantial one, which should also be considered by this Court if it were to consider any part of the case. In synopsis, we urge:

(a) The statute in six passages in §§ 601-603 defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act. That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a). Yet there is not a word in the statute or its history to suggest that the vessels subsidized by the 1936 Act could not carry these cargoes, or would be subject to subsidy abatement if they were carried.

(c) Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation (*supra*, p. 3) the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings:[4]

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his

[4] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2.

operating expenses. He must have cargo, in other words."

(d) The Maritime Subsidy Board may never have addressed this issue in the same depth as it did in this proceeding [A-17, 38], but it is not contested by the Government that (a) the Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and (b) in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of many examples, in *American President Lines, Ltd.*, 65 SRR 1031, 1041 (1966), the Board noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(e) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

(f) The difference between AIMS and the Government thus comes down to the narrow issue of whether the Maritime Administration can undo this long administrative practice, accompanied throughout by Congressional understanding and acquiesence. The Court below, recognizing that "the decisions are not uniform," thought "the better rule appears to be that an agency is free to act when conditions change and is not tied to past practices." [5]

---

[5] A litigating dilemma inheres in the Court's use here of a "changed conditions" rationale. The agency record closed with 1969, at the height of the Vietnam war, and naturally showed a heavy concentration of trans-Pacific preference cargo. By the time

[A-22-23]. None of the cases establishing this "better rule" dealt with an agency interpretation of 23 years standing, buttressed by an explicit Congressional understanding evidenced over the first six years of the period and never thereafter altered. A rule so firmly established may be changed, or "modernized," only by the Congress.

CONCLUSION

If the primary petition in *American Maritime Association* v. *Peterson*, No. 75——, should be granted, so too should this petition be granted in order to have the whole case before the Court. If the primary petition is denied, so too should this petition be denied.

Respectfully submitted,

WARNER W. GARDNER
ROBERT T. BASSECHES
734 - 15th Street, N.W.
Washington, D. C. 20005

ODELL KOMINERS
1776 F Street, N.W.
Washington, D. C. 20006

KOMINERS, FORT, SCHLEFER & BOYER
SHEA & GARDNER

Of Counsel

December 4, 1975

---

of the 1975 decision of the Court of Appeals, the Vietnam war was long over, and the latest change in conditions—not reflected in this record—returned the conditions to where they were before Vietnam. Yet if the case were remanded to produce evidence of this change back to unchanged conditions, another several years would pass with who knows what subsequently developed change in conditions

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 33 of this Court service of three copies of the foregoing petition has this day been made by first class mail, postage prepaid, upon Joseph A. Klausner, Esq., 1028 Connecticut Avenue, N.W., Washington, D. C. 20036 and upon the Solicitor General, Department of Justice, Washington, D. C. 20530.

WARNER W. GARDNER

INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 2

Statement 2

Argument 6

Conclusion 11

CITATIONS

Cases:

Atlantic Express Lines of America—Subsidy Application, 1 DOC 104 8

Helvering v. *Wilshire Oil Co.,* 308 U.S. 90 9

Milk Transport, Inc. v. *Interstate Commerce Commission,* 190 F. Supp. 350, affirmed, 368 U.S. 5 8

National Labor Relations Board v. *J. Weingarten, Inc.,* 420 U.S. 251 9

Securities and Exchange Commission v. *Chenery Corp.,* 318 U.S. 80 8

Statutes and regulations:

Merchant Marine Act of 1936, 49 Stat. 1985 *et seq.,* as amended, 46 U.S.C. 1101 *et seq.,* 2

Section 101, 46 U.S.C. 1101 8

Section 211(a), 46 U.S.C. 1121(a) 4, 7

Section 211(b), 46 U.S.C. 1121(b) 4

Page

Statutes and regulations (continued):

Section 501(a), 46 U.S.C. 1151(a) 3

Section 601(a), 46 U.S.C. 1171(a) 3-4, 7

Section 603(b), 46 U.S.C. 1173(b) 3

Sections 605(a), 46 U.S.C. 1175(a) 7

Section 804, 46 U.S.C. 1222 7

Section 805(a), 46 U.S.C. 1223(a) 7

Section 901(b), 46 U.S.C. 1241(b) 2

Section 905(a), 46 U.S.C. 1244(a) 10

Merchant Marine Act Amendment of 1970, Section 40(a), 84 Stat. 1037 9

10 U.S.C. 2631 2

15 U.S.C. 616a 2

46 C.F.R. Part 280 4

46 C.F.R. 280.2(e) 4

46 C.F.R. 280.4(a) 5

Miscellaneous:

H.R. Rep. No. 1818, 84th Cong., 2d Sess. (1956) 7

S. Rep. No. 91-1080, 91st Cong., 2d Sess. (1970) 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-798

AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL, PETITIONER

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

No. 75-800

AMERICAN MARITIME ASSOCIATION, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-28)[1] is reported at 518 F.2d 1070. The opinion of the district court (Pet. App. A-29 to A-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1975. The petitions for a writ of certiorari

---

[1] "Pet. App." refers to the separately bound appendix in No. 75-800.

were filed on December 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Maritime Subsidy Board was authorized to issue a regulation that would reduce operating-differential subsidies for merchant marine lines, to the extent certain cargo reserved by statute for carriage by U.S. flag vessels produced more than half of their earnings.

2. Whether the Merchant Marine Act requires the rebate of construction-differential subsidies for American-built vessels that operate in foreign commerce but do not encounter substantial foreign-flag competition.

STATUTES INVOLVED

The relevant statutes are reprinted at Pet. App. A-81 to A-98.

STATEMENT

1. The American Maritime Association ("AMA"), petitioner in No. 75-800, is an organization of unsubsidized American shipping companies. In July 1969 it requested the Secretary of Commerce to issue rules under the Merchant Marine Act of 1936, 49 Stat. 1985 *et seq.*, as amended (the "Act"), 46 U.S.C. 1101 *et seq.*, that would forbid the payment (or the award of a contract requiring the payment) of an operating-differential subsidy to any shipping company that carried "preference" cargo. Preference cargo is cargo reserved by law for shipment in U.S. flag vessels, including all military cargo, all cargo the purchase of which is financed by the Export-Import Bank, and 50 percent of certain other cargo (Pet. App. A-2, A-6).[2]

---

[2]See 10 U.S.C. 2631 (military cargo); 15 U.S.C. 616a (cargo purchased with government loans); Sections 901(b), 46 U.S.C. 1241(b) (government-owned or financed cargoes).

Operating-differential subsidy contracts may be awarded under Section 601(a) of the Act, 46 U.S.C. 1171(a), only if the operation of a vessel in a particular route, line, or service "is required to meet foreign-flag competition." An operating-differential subsidy is payable under Section 603(b) of the Act, 46 U.S.C. 1173(b), only to make up the differential of certain operational costs between U.S. flag vessels and vessels of foreign-flag "substantial competitors." AMA argued that, to the extent a U.S. flag vessel carries preference cargo, its operation does not meet foreign-flag competition, since foreign-flag vessels cannot compete for or carry that cargo. Therefore, it continued, no subsidy whatever should be provided to the extent any line carries preference cargo. AMA also requested the Secretary to issue a rule requiring subsidized shipping lines to rebate the construction-differential subsidy they may have received under Section 501(a) of the Act, 46 U.S.C. 1151(a), to the extent any vessels built with the subsidy (and operated by lines receiving operating-differential subsidy) are used to carry preference cargo rather than to meet foreign-flag competition.[3]

The Maritime Subsidy Board, the Secretary's delegate, commenced rulemaking proceedings. The American Institute of Merchant Shipping, Liner Council ("AIMS"), petitioner in No. 75-798, an organization of subsidized American shipping companies, participated in the rulemaking and opposed the issuance of any rules that would require the reduction or rebate of subsidies.

2. In June 1972 the Maritime Subsidy Board announced a decision that satisfied neither petitioner.

a. With respect to AMA's contention that a vessel carrying preference cargo should not receive an operating-differential subsidy, the Board held that Section 601(a)

---

[3]The rules proposed by AMA are set out at Pet. App. A-71 to A-73.

of the Act, 46 U.S.C. 1171(a), which states that a subsidy will be provided only if "required to meet foreign-flag competition," allows a subsidy to be furnished when a carrier meets "substantial" foreign-flag competition. Competition is "substantial," the Board held, if less than 50 percent of a carrier's revenue is derived from preference cargo that moves at rates insulated from foreign competition (Pet. App. A-43).[4] Determining that payment of the subsidy should not depend upon the simple absolutes postulated by either AMA or AIMS, the Board wrote (Pet. App. A-42):

> We think the statute and its legislative history clearly establish that the purpose of the [operating-differential subsidy] program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored. Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

Regulations implementing the Board's decision were adopted in October 1972. 46 C.F.R. Part 280. The regulations provide for the reduction of operating-differential subsidy on a sliding scale where less than 50 percent of gross annual freight revenues from a particular route, line, or service (computed separately for outbound and inbound voyages) are derived from cargoes subject to foreign-

---

[4]The Board's decision applies only to general cargo operations in regular liner services, not to bulk carrying services. See Pet. App. A-37, n. 9; 46 C.F.R. 280.2(e); Section 211(a), 46 U.S.C. 1121(a). Bulk carriers did not become eligible for the operating-differential subsidy until 1970. See 46 U.S.C. 1121(b) and 1171(a).

flag competition.[5] 46 C.F.R. 280.4(a)(2).

b. The Board rejected AMA's claim concerning construction-differential subsidy for American-built vessels that carry preference cargo in foreign commerce. The Board pointed out that since 1952 there has been no requirement in the Act that such vessels "meet foreign-flag competition" (Pet. App. A-67). So long as a vessel engages in "foreign commerce," the Board held, it meets the requirements of Section 501(a) of the Act for a construction-differential subsidy (Pet. App. A-67 to A-68).

3. In the district court AMA urged that the Board's regulations did not go far enough in requiring reduction or rebate of the subsidies. AIMS intervened, claiming (as it does here) that the Board had no power to reduce the operating-differential subsidy. The district court granted summary judgment in favor of AIMS (Pet. App. A-29 to A-33).

AMA and the Secretary appealed. The court of appeals reversed; it upheld the Board's decision in full (Pet. App. A-1 to A-28), rejecting the arguments of both AMA and AIMS. The court of appeals wrote (Pet. App. A-24 to A-25):

> The Act consistently speaks of awarding [operating] subsidies only to vessels "meeting foreign competition". The legislative history, however, indicates that Congress had contemplated the payment of some "double subsidies" to shippers carrying preference cargo. Whether or not this is "unfair competition", as AMA contends, it was foreseen by Congress. The Board's rule reducing subsidy when a vessel is not in

---

[5]Some preference cargo is deemed to be "subject to foreign-flag competition" because it is carried at "conference rates" or at competitive "world rates." See Pet. App. A-45. All non-preference cargo is deemed to be "subject to foreign-flag competition."

"substantial competition" appears to strike a sound balance between the intention of Congress and the competitive needs of the industry.

ARGUMENT

The Board and the court of appeals have dealt exhaustively with the issues raised by petitioners, and their decisions are correct. As the court of appeals concluded, the order of the Board "is a reasonable and proper determination of a difficult and complex situation, both factually and legally" (Pet. App. A-28). The decisions of the Board and the court of appeals achieve the objectives of the Merchant Marine Act. The contrary and opposed positions of the unsubsidized and subsidized companies would not further these objectives; each segment of the industry is seeking a competitive advantage at the expense of the other and of the national interest. There is no conflict among the circuits or with any decision of this Court, and no further review is warranted.

1. Petitioner AMA argues that "[u]pon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American merchant marine, which has represented the surge capacity of the nation at war or in emergency * * *" (Pet. 9). AMA contends that the demise in the last several years of the unsubsidized breakbulk fleet of the United States has been caused by the ability of subsidized carriers to underbid its members for the preference cargo upon which they depend.

That is not the case. The Board explained (Pet. App. A-64; footnote omitted):

> It is true, of course, that the unsubsidized breakbulk fleet is rapidly being scrapped or sold foreign. This status, however, seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators.

Unsubsidized operators are able to compete effectively with subsidized carriers because the law imposes substantial economic disadvantages on the latter. First, subsidized carriers are limited to regularly-scheduled services over a fixed route, while the unsubsidized lines are not. 46 U.S.C. 1121(a) and 1171(a). The operations of the unsubsidized lines therefore are more flexible and less costly. Second, the subsidized lines lose their subsidy to the extent that they engage in domestic trade. Sections 605(a) and 805(a), 46 U.S.C. 1175(a) and 1223(a). Third, the subsidized lines cannot have foreign affiliations. Section 804, 46 U.S.C. 1222. Fourth, subsidized lines must use American-built ships. 46 U.S.C. 1171(a). In light of these restrictions it should come as no surprise that one of the largest, fastest-growing and most profitable lines receives no operating-differential subsidy.[6]

2. The cargo preference laws have been instrumental in maintaining the vitality of American shipping. They represent a form of subsidy to all American lines, to the extent they enable those lines to carry more revenue-earning cargo than they otherwise would. They operate to prevent American ships from sailing "with empty or half empty holds." H.R. Rep. No. 1818, 84th Cong., 2d Sess. 2 (1956). Operating-differential subsidy makes up the difference between the cost of operating an American ship and the cost of operating a foreign ship. But the subsidized carrier, like any other carrier, must attract cargo or lose money.

The cargo preference laws were not designed to aid just the unsubsidized segment of the American merchant

---

[6]Sea-Land Services, Inc. (a member of AMA), pioneered containerized cargo operations. An economic consultant for Sea-Land noted that the restrictions upon the operation of a subsidized carrier would "seriously reduce Sea-Land's flexibility of operations which have contributed significantly to profitability in the past" (AIMS Exh. 252, p. 2).

marine. But neither were they designed to permit the subsidized lines to avoid their statutory obligation to "meet foreign-flag competition" by concentrating upon the carriage of non-competitive preference cargo. The Board's decision recognizes both these points and harmonizes the operating subsidy program with the cargo preference laws by requiring a reduction of operating-differential subsidy if the subsidized line does not "substantially" meet foreign-flag competition. The Board's ruling is amply supported by the statutory language and legislative history, as the opinion of the court of appeals demonstrates (Pet. App. A-11 to A-17, A-24 to A-25). The "50 percent" rule harmonizes the statutory policies by giving equal effect to the congressional requirement of competition and the congressional authorization to carry non-competitive preference cargoes[7]. Compare *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, with *Milk Transport, Inc.* v. *Interstate Commerce Commission*, 190 F.Supp. 350, 354-355 (D. Minn.), affirmed, 368 U.S. 5.[8]

3. AIMS argues that the Board is perpetually bound by what it contends[9] has been the Board's practice of not

---

[7]AMA argues that the substantial competition rule cannot be reconciled with the Board's allegedly absolute rule against carriage of preference cargoes by bulk carriers, which became entitled to operating-differential subsidy by virtue of a 1970 amendment. See Pet. 15. There is no such general prohibition, however. AMA's quotation from the Federal Register was a description of the facts of a particular subsidy application.

[8]Cf. *Atlantic Express Lines of America—Subsidy Application*, 1 DOC 104, 110 (Section 101 of the Act, 46 U.S.C. 1101, establishing a goal of developing a merchant marine capable of carrying a "substantial portion" of the nation's foreign water-borne commerce, means that at least 50 percent of such commerce should be so carried).

[9]But see Pet. App. A-22.

reducing the operating-differrential subsidy on account of excessive carriage of preference cargo. But the Bord has done nothing more than to interpret, for the first time (Pet. App. A-38), the governing statutes. The court of appeals properly held that an agency "is free to act when conditions change and is not tied to past practices, as long as its decisions are fairly reasoned and considered" (Pet. App. A-23). This Court has articulated that principle many times. See, *e.g.*, *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100-101; *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251, 264-267.[10]

4. AMA (Pet. 16-18) faults the Board's determination that "cargoes subject to foreign-flag competition," and therefore not subject to subsidy reduction, include conference-rated preference cargoes.

Much preference cargo is shipped at "conference" rates—rates identical to the rates that would be charged for its transportation in foreign bottoms.[11] The Board explained (Pet. App. A-50) that "[s]ince commercial [non-preference] cargo and preference cargo moving under the conference rate system are generally indistinguishable by physical characteristics, the competitive attributes of carrying conference-rated preference cargo are virtually

---

[10]Congress acknowledged the instant proceedings and deferred to them. Section 40(a) of the 1970 Amendments, 84 Stat. 1037, provides that nothing in the amendments "shall be deemed to affect or to change existing law or contracts with respect to the proceedings now pending before the Secretary of Commerce relating to the payment of subsidy in respect of cargoes covered by" a preference.

[11]"Where conferences exist, the cargo rates are the same for vessels of all nations * * *." S. Rep. No. 91-1080, 91st Cong., 2d Sess. 10-11 (1970).

identical to those of carrying conference-rated commercial cargo." The Board therefore properly accorded conference-rated preference cargo a status equal to that of non-preference cargo for subsidy purposes.

5. AMA finally argues (Pet. 18-28) that construction-differential subsidies must be rebated to the extent that American-built vessels carry preference cargo, and also receive an operating-differential subsidy. Under AMA's argument its members, which receive no operating-differential subsidy, could retain their construction-differential subsidy no matter how much preference cargo their vessels transport. See AMA's proposed rule 3B, Pet. App. A-72 to A-73.

But the Act draws no distinctions based on this criterion. As its name implies, a construction-differential subsidy equalizes the costs of construction of a vessel, not the cost of its operation. Under the Act, a vessel is entitled to retain its construction-differential subsidy so long as it is engaged in "foreign commerce" of the United States. "Foreign commerce" is expressly defined in Section 905(a) of the Act, 46 U.S.C. 1244(a), as "commerce or trade between the United States * * * and a foreign country * * *." The definition does not require competition with foreign vessels. The omission is understandable, since the major purpose of the construction-differential subsidy is to enable American lines to purchase American-built vessels at a price competitive with what would be charged by foreign shipyards for foreign-built vessels. The type of cargo subsequently carried by the vessel is not material to this purpose.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

JANUARY 1976.

DOJ-1976-01